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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JULIO CESAR OCHOA ENRIQUEZ,

Defendant and Appellant.

F075149

(Fresno Super. Ct. No. F16901065)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Jane Cardoza, Judge.

Monique Q. Boldin, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Lewis A. Martinez, and Amanda D. Cary, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Poochigian, Acting P.J., Detjen, J. and Peña, J.

INTRODUCTION

A jury convicted Julio Cesar Ochoa Enriquez (appellant) of criminal threats, and he was sentenced to 11 years in prison. On appeal, appellant contends the trial court erroneously allowed the prosecution to introduce evidence of his parole status. He also contends the matter must be remanded for the court to consider whether it should exercise its discretion and strike the five-year prior serious felony enhancement, based on amendments to Penal Code¹ section 667, subdivision (a) enacted by Senate Bill No. 1393 (2017–2018 Reg. Sess.); the prior prison term enhancements (§ 667.5, subd. (b)) must be stricken; and the court improperly ordered him to pay a restitution fine and other fees in violation of his due process rights pursuant to *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*).

We strike appellant’s admissions and the terms imposed for the section 667.5, subdivision (b) enhancements, remand the matter for the court to consider whether to exercise its discretion for the section 667, subdivision (a) enhancement, and otherwise affirm.

PROCEDURAL BACKGROUND

The Fresno County District Attorney’s Office filed a first amended information charging appellant with criminal threats (§ 422) and alleged he personally used a dangerous weapon during the commission of the offense (§ 12022, subd. (b)(1)). It was further alleged he had one prior strike conviction; one prior serious felony enhancement (§ 667, subd. (a)) and three prior prison term enhancements (§ 667.5, subd. (b)).

The case was originally tried in front of the Honorable Houry Sanderson. During the People’s case in chief, the court declared a mistrial, and the matter was later reassigned to the Honorable Jane Cardoza.

¹ All further statutory citations are to the Penal Code unless otherwise indicated.

Following retrial, the jury convicted appellant of criminal threats and acquitted him of the use of a deadly weapon allegation. Appellant admitted the prior conviction allegations.

The court sentenced appellant to an aggregate term of 11 years, based on the midterm of two years for criminal threats, doubled to four years as the second strike sentence; plus five years for the prior serious felony enhancement, and two one-year terms for the prior prison term enhancements. The court ordered the third prior prison term enhancement stricken because it was based on the same conviction as the prior serious felony enhancement.

FACTUAL BACKGROUND

Appellant is Francisco Lopez's brother-in-law, and the brother of his wife, Veronica Lopez.² In November of 2015, appellant was released from prison on parole and began staying with Francisco and Veronica's daughter. However, appellant failed to follow house rules set out by their daughter, and after an argument during which appellant pushed a door open into her, appellant moved in with Francisco and Veronica.

In the months that followed, appellant's behavior became increasingly bizarre and paranoid. His moods worsened, he stopped eating regularly, and he began claiming people were spying on him through cell phones and the Internet. In one incident, appellant took Francisco's car without his permission, and when he returned, he left the car parked in front of the house with the engine running and the door open. Appellant then went into the house, covered in dirt and blood from his job at the slaughterhouse, and laid on Francisco and Veronica's son's bed. In another incident, Veronica witnessed appellant attempt to steal equipment out of Francisco's work vehicle.

Tensions rose between Francisco and appellant on February 9, 2016, when Francisco and Veronica's daughter called and told Veronica appellant had gone into her

² For purposes of clarity, Francisco Lopez and Veronica Lopez will be referred to by their first names.

yard without her permission. Later that day, appellant parked his car in front of Francisco and Veronica's driveway to block their cars and refused to move his car because he believed Francisco was mistreating Veronica and did not allow her to "go anywhere." Veronica spoke with appellant and was able to calm him down and eventually convinced him to move the car.

The following morning, while Francisco was at work, he received a call from Veronica who told him appellant claimed he connected his cell phone to Francisco's computer and discovered Francisco had a plan to kill Veronica and the rest of the family. Veronica warned Francisco appellant told her he was going to try to kill him. While they were still on the phone, appellant entered Francisco's place of work and walked up to him. Appellant drew a letter opener, raised it, pointed it at Francisco and said, "I'm going to kill you." Francisco responded he was on the phone with Veronica, and she had warned him about what appellant would try to do. Without saying anything, appellant put his arm down, turned and left. Immediately after, Francisco left and reported appellant's conduct to the police, while Veronica contacted appellant's parole officer. Appellant was arrested by the police later that day.

Francisco testified that he was in fear for his life when appellant threatened him. He explained his fear was based in part on appellant's recent bizarre behavior and on his knowledge of appellant's criminal past. He testified that after appellant began his new job, appellant told him he had to register at the sheriff's office "due to the previous offense he had been in prison for before ... because he had committed a high-level offense with aggression." He knew appellant was on parole, and the fact that he was being supervised made him feel safer having appellant stay at his house.

DISCUSSION

I. Admission of Appellant's Parole Status

Appellant contends the trial court should have excluded evidence of his parole status pursuant to Evidence Code³ section 352, alleging its probative value was substantially outweighed by the danger of unfair prejudice. We disagree.

In the first trial, in front of Judge Sanderson, appellant moved in limine to exclude references to his parole status. The People did not oppose the motion, and the court granted it without the need to perform a section 352 analysis. After several witnesses referred to appellant's parole status in front of the jury in violation of the court's ruling, Judge Sanderson declared a mistrial based on the cumulative prejudicial effect of the violations.

Before the retrial in front of Judge Cardoza, the People moved in limine to allow civilian witnesses "to refer to [appellant's] supervision status for the limited purpose of explaining their state of mind or their conduct." In the section 402 hearing that followed, Francisco testified that his fear of appellant's threat was based in part on appellant having told him he is on parole for an unspecified violent offense. Based on this testimony, the court granted the People's motion, reasoning although admitting appellant's parole status carried some potential for prejudice, it was highly probative to the elements of criminal threats.

Section 352 states, in relevant part: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will ... create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "Broadly speaking, evidence tends to be more prejudicial than probative when it poses an intolerable risk to the fairness of the proceedings or reliability of the outcome. [Citation.]" (*People v. Lucas* (2014) 60 Cal.4th 153, 231, disapproved

³ All statutory references in issue I are to the Evidence Code unless otherwise indicated.

on other grounds by *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19.)

“ ‘Prejudice’ in the context of ... section 352 is not synonymous with ‘damaging’: it refers to evidence that poses an intolerable risk to the fairness of the proceedings or reliability of the outcome. [Citation.]” (*People v. Booker* (2011) 51 Cal.4th 141, 188.)

“We apply an abuse of discretion standard to review a trial court’s ruling on the admissibility of evidence under section 352. [Citation.]” (*People v. Eubanks* (2011) 53 Cal.4th 110, 144–145.)

We conclude the trial court did not commit an abuse of discretion, because it correctly recognized the victim’s knowledge of appellant’s parole status was highly probative to the elements of criminal threats. To prove the crime of criminal threats, the prosecution must establish “that the threat actually caused the person threatened ‘to be in sustained fear for his or her own safety or for his or her immediate family’s safety,’ and ... that the threatened person’s fear was ‘reasonabl[e]’ under the circumstances. [Citation.]” (*People v. Toledo* (2001) 26 Cal.4th 221, 227–228.) Therefore, the subjective existence and objective reasonableness of the victim’s fear are both relevant.

Francisco testified in the section 402 hearing and during trial that his knowledge that appellant was on parole for a violent offense contributed to his fear. That appellant shared this information with the victim was both relevant to whether the victim subjectively experienced sustained fear and whether such fear was reasonable. Francisco’s belief that appellant had been to prison for committing a violent crime in the past made it more reasonable for him to believe appellant would follow through on his threat to kill him.

In the analogous case of *People v. Garrett* (1994) 30 Cal.App.4th 962 (*Garrett*), the defendant was convicted of criminal threats based on his threatening to “ ‘put a bullet’ ” in his wife’s head. (*Id.* at p. 965.) In affirming the judgment, the court held the trial court did not abuse its discretion in denying the defendant’s motion to exclude his prior manslaughter conviction and evidence the defendant had committed prior acts of

domestic violence against his wife. The court reasoned the defendant's prior acts were relevant to establish the elements of criminal threats, including whether the wife experienced sustained fear. (*Id.* at p. 967.) In evaluating the defendant's claim the evidence should have been excluded pursuant to section 352, the court noted: "Seldom will evidence of a defendant's prior criminal conduct be ruled inadmissible when it is the primary basis for establishing a crucial element of the charged offense." (*Id.* at p. 967.)

Similarly, Francisco testified that his fear was based in part on his knowledge that appellant was on parole for a violent offense. His belief that appellant had committed an act of violence in the past that resulted in him going to prison helped explain not only his own subjective fear but helped rebut a potential defense claim he was overreacting or should not have taken appellant's threat seriously. The reasoning in *Garrett* is applicable because appellant's prior criminal conduct is relevant to establishing elements of the crime of criminal threats.

Appellant contends evidence of his parole status was particularly prejudicial due to the possibility the jury would consider it for propensity purposes, as prohibited by section 1101, subdivision (a).⁴ However, section 1101, subdivision (b),⁵ allows a party to introduce evidence of a person's prior crime or other act when relevant to prove a fact other than that person's " 'disposition to commit such an act.' " (*Garrett, supra*, 30

⁴ Section 1101, subdivision (a), states: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

⁵ Section 1101, subdivision (b), states: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

Cal.App.4th at p. 967.) Here, the trial court admitted evidence of appellant's parole status "not for the purpose of showing appellant's disposition to commit the charged offense but, rather for the purpose of establishing crucial elements of that offense." (*Id.* at pp. 967–968.) Moreover, the trial court instructed the jurors not to consider evidence of appellant's parole status for character or propensity purposes, and only to explain Francisco's "state of mind and/or behavior," thereby limiting the danger of unfair prejudice.⁶ (*People v. Hendrix* (2013) 214 Cal.App.4th 216, 247 ["A limiting instruction can ameliorate section 352 prejudice by eliminating the danger the jury could consider the evidence for an improper purpose"].)

Appellant relies heavily on Judge Sanderson's ruling in the first trial to exclude evidence of appellant's parole status in support of his argument its admission at retrial was highly prejudicial. While we do not find Judge Sanderson's rulings unreasonable, "previous rulings during the course of trial which culminate on a mistrial are not binding on retrial." (*People v. Sons* (2008) 164 Cal.App.4th 90, 99, italics and capitalization omitted). Our assessment of whether Judge Cardoza committed an abuse of discretion, a standard under which a ruling " " "will not be reversed merely because reasonable people might disagree," ' ' " is based solely on the facts presented to the court and is not controlled the prior judge's evidentiary rulings. (*People v. Carmony* (2004) 33 Cal.4th 367, 376–377.) Moreover, Judge Sanderson evaluated evidence of appellant's parole status in a different context than Judge Cardoza. Judge Sanderson never weighed the probative value of appellant's parole status against its potential prejudicial effect because

⁶ At the close of evidence, the trial court gave the following limiting instruction: "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other. For example, you are not permitted to use evidence of Francisco Lopez's beliefs about the defendant's past, including references to prison, parole or past bad acts, to show that the defendant behaved in conformity with that character on a particular occasion or had a propensity or disposition to engage in a certain type of conduct. Rather, that evidence can only be used to help explain Francisco Lopez's state of mind and/or behavior on February the 10th, 2016."

the People did not object to appellant's motion to exclude and did not articulate how appellant's parole status was relevant to proving the elements of criminal threats.

This court must consider whether the trial court abused its discretion in admitting evidence of appellant's parole status. Under the abuse of discretion standard, an appellate court may not intervene unless the trial court's ruling "is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony*, *supra*, 33 Cal.4th at pp. 376–377.) We conclude the trial court's ruling was reasonable and based on appropriate considerations, and therefore the trial court did not commit an abuse of discretion.

II. The Prior Serious Felony Enhancement

Appellant contends the matter must be remanded for the court to decide whether to exercise its discretion to strike the prior serious felony enhancement based on the subsequent enactment of Senate Bill No. 1393. The People agree.

A. Background

On February 3, 2017, the court conducted the sentencing hearing. Appellant requested the court dismiss his prior strike conviction, which was for assault with a firearm (§ 245, subd. (a)(2)) in 2006, pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. Appellant argued it occurred over 10 years earlier, he had only one other felony conviction in 2009, just had a misdemeanor and parole violations after that, and he did not commit any crimes of physical violence since that time. Appellant also asked the court to strike the prior prison term enhancement that was based on the same assault conviction that was the basis for both the prior strike and the prior serious felony enhancement.

The court acknowledged it had discretion to dismiss the prior strike conviction but denied appellant's request.

"After considering all the circumstances of this case, considering the defendant's criminal history, the Court will not – well, will not strike the strike. Again, the Court is

looking at the defendant's criminal history. And despite the argument that the strike is one that was suffered in 2006, the defendant has continuously been in contact with law enforcement and has been incarcerated for periods of time and has been unable to truly abide by the conditions of either probation or parole. So for all those reasons the Court will not strike the strike.”

The court stated appellant was not eligible for probation, but found probation would not be appropriate even if he was eligible because he posed “a significant risk to the safety of the community” and found “nothing” to support a grant of probation, based on the trial evidence and the contents of the probation report.

The court rejected the prosecutor’s argument that the upper term was appropriate, and instead agreed with the probation report’s recommendation and imposed an aggregate term of 11 years, based on the midterm of two years for criminal threats, doubled to four years as the second strike sentence; plus five years for the prior serious felony enhancement, and two one-year terms for two prior prison term enhancements. The court ordered the third prior prison term enhancement stricken because it was based on the same conviction as the prior serious felony enhancement.

B. Analysis

At the time of the sentencing hearing in this case, the court was statutorily required to impose the section 667, subdivision (a) enhancement and did not have any authority to strike or dismiss it. (§ 667, former subd. (a)(1); § 1385, former subd. (b).)

Effective January 1, 2019, sections 667 and 1385 were amended by Senate Bill No. 1393 to remove the prohibitions on striking or dismissing a prior serious felony enhancement. (See Stats. 2018, ch. 1013, §§ 1–2.) The amended statutes apply retroactively to all cases that are not yet final. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971–973; *People v. Zamora* (2019) 35 Cal.App.5th 200, 208.)

Appellant contends, and the People concede, that the amendments enacted by Senate Bill No. 1393 are retroactive and this case should be remanded for the court to

decide whether to exercise its discretion to dismiss the prior serious felony enhancement since the record does not show the court would not have exercised its discretion.

We agree that remand is required. While the court declined to dismiss the prior strike conviction, it recognized that it had discretion to do so and explained why it decided not to dismiss the strike. At that time, however, it did not have any discretion to dismiss the prior serious felony enhancement. In addition, it rejected the prosecution's argument to impose the upper term and instead decided to impose the midterm. Therefore, remand is appropriate and would not be an idle act.

III. The Prior Prison Term Enhancements

Appellant admitted three prior prison term enhancements pursuant to section 667.5, subdivision (b), based on convictions for (1) assault with a firearm in 2006 (§ 245, subd. (a)(2)); (2) battery by a prisoner on a nonconfined person in 2008 (§ 4501.5); and (3) carrying a concealed dirk or dagger (§ 21310) and possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) in 2012.

The court imposed two consecutive one-year terms for the second and third prior prison term enhancements. It ordered the first prior prison term enhancement stricken because it was based on the same assault conviction as the prior serious felony enhancement.

Appellant contends, and the People concede, that defendant's admissions to the three prior prison term enhancements, and the two one-year terms imposed for those enhancements, must be stricken.

Effective January 1, 2020, Senate Bill No. 136 amended section 667.5, subdivision (b), to limit prior prison term enhancements to only prior terms that were served for sexually violent offenses as defined by Welfare and Institutions Code section 6600, subdivision (b). (§ 667.5, subd. (b), as amended by Stats. 2019, ch. 590, § 1, eff. Jan. 1, 2020.) None of defendant's prior prison terms were served for a sexually

violent offense and, thus, appellant's admissions and the two years imposed for the enhancements must be stricken

IV. The Restitution Fine and Fees

At the sentencing hearing, the court sentenced appellant to 11 years in prison, imposed a restitution fine of \$3,300 (§ 1202.4), stayed the parole revocation fine of \$3,300. The court imposed a court security fee of \$40 (§ 1465.8) and a criminal conviction assessment of \$30 (Gov. Code, § 70373). The court found appellant did not have the ability to pay the cost of appointed counsel in light of appellant's prison sentence.

Appellant relies on *Dueñas* and argues the court improperly imposed the restitution fine and fees in violation of his due process rights without determining whether he had the ability to pay these amounts. Appellant asserts the restitution fine should be stayed and the fees stricken.

Dueñas held that “due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay” before it imposes any fines or fees. (*Dueñas, supra*, 30 Cal.App.5th at pp. 1164, 1167.)⁷

We find the matter need not be remanded on this issue. If we were to assume *Dueñas* applies to this case, appellant has forfeited any challenge to his alleged inability to pay the restitution fine and fees. The court ordered him to pay a restitution fine of \$3,300 under section 1202.4, subdivision (b). When the court imposes a restitution fine greater than the \$300 statutory minimum amount, “[s]ection 1202.4 expressly contemplates an objection based on inability to pay.” (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153 (*Frandsen*).)

⁷ The California Supreme Court is currently considering whether trial courts must consider a defendant's ability to pay before imposing or executing fines, fees, and assessments; and if so, which party bears the applicable burden of proof. (See *People v. Kopp* (2019) 38 Cal.App.5th 47, 94–98, review granted Nov. 13, 2019, S257844.)

While *Dueñas* had not been decided at the time of defendant's sentencing hearing, appellant had the statutory right to object to the \$3,300 restitution fine and demonstrate his alleged inability to pay, and such an objection "would not have been futile under governing law at the time of his sentencing hearing. [Citations.]" (*Frandsen, supra*, 33 Cal.App.5th at p. 1154.) In addition, any objections to the assessments imposed under section 1465.8 and Government Code section 70373 would not have been futile. "Although both statutory provisions mandate the assessments be imposed, nothing in the record of the sentencing hearing indicates that [the defendant] was foreclosed from making the same request that the defendant in *Dueñas* made in the face of those same mandatory assessments. [The defendant] plainly could have made a record had his ability to pay actually been an issue. Indeed, [he] was obligated to create a record showing his inability to pay the ... restitution fine, which would have served to also address his ability to pay the assessments." (*Frandsen, supra*, 33 Cal.App.5th at p. 1154.)

The court's finding that appellant lacked the ability to pay attorney fees does not support his arguments about the restitution fine and fees. Section 987.8, subdivision (b) states that in considering the defendant's ability to pay and reimburse the county for the costs of appointed counsel, the court must give defendant notice that such costs may be assessed and an opportunity to be heard. In addition, the court may consider both the defendant's "present financial position and his reasonably discernible financial position during the following six months. [Citation.]" (*People v. Rodriguez* (2019) 34 Cal.App.5th 641, 646.) "But there's an important exception: If the defendant is sentenced to prison or to county jail for more than 364 days, he 'shall be determined not to have a reasonably discernible future financial ability to reimburse' defense costs '[u]nless the court finds unusual circumstances.' [Citation.] [¶] Put another way, there is 'a presumption under the statute that a defendant sentenced to prison does not have the ability to reimburse defense costs.' [Citation.] To rebut this presumption, there must be 'unusual circumstances.' [Citation.]" (*Ibid.*) "[T]he court 'must make an express finding

of unusual circumstances before ordering a state prisoner to reimburse his or her attorney.’ [Citations.]” (*Ibid.*) As applied to this case, the court’s finding on attorney fees was based on the specific statutory presumption of section 987.8, arising from the imposition of the prison sentence.

DISPOSITION

Appellant’s admissions to the three section 667.5, subdivision (b) prior prison term enhancements, and the court’s imposition of the two consecutive one-year terms for two of those enhancements, are stricken.

The matter is remanded for the trial court to decide whether to exercise its discretion to dismiss the section 667, subdivision (a) prior serious felony enhancement.

Thereafter, the court is directed to prepare and forward to the California Department of Corrections and Rehabilitation and all appropriate parties a new abstract of judgment reflecting all modifications to the sentence.

As modified, the judgment is affirmed.